

Underground Land Acquisition Cases in Malaysia: Lessons Learnt for Future 3D Ownership

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SUMMARY

Physical development, especially in the urban area, is essential for catering to the needs of the public facility and amenities, but while balancing the needs of the private interest and rights. Intense development in the urban area in Malaysia pushes the vertical development to a higher need and demand. The discussion and initiative for airspace ownership have sparked due to the demand for development. The introduction of underground alienation and usage in the land management and legal framework has been put to the test as the underground land acquisition takes place for the current development needs. Cases have been brought to the court for fairer compensation payments. As the airspace development has been in the pipeline, these situations can provide some insights and lessons for the introduction of airspace ownership and the inclusion or transition to the new 3D land ownership. This paper intends to explore the loopholes and ambiguity of the underground land alienation and usage under the current land legal framework. The study embarks on a qualitative approach involving legislation review and case study of current court cases for the underground land development in Malaysia, especially related to the underground land acquisition under the Land Acquisition Act 1960 [Act 486]. The findings suggest, among others, that a new 3D ownership is a better option for the introduction of a legal framework on airspace alienation and usage.

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1. INTRODUCTION

Physical development is very important, especially in developing countries, to accelerate economic growth and social development (Ramli, 2021; Williamson, 2000). Rapid development is indispensable in order to catch up with the development of developed countries. Similarly, in Malaysia, as a developing country, the initiative to accelerate development in both urban and rural areas is vital. More often, the need in urban areas is changing with the change of development pace and space requirements (Mohamed et al., 2025; Mohamed, Razali, et al., 2024). In addition, the development also needs to be in line with sustainable development to provide not only physical development, but also socio-economic development (ALLAM et al., 2023; Omar et al., 2003; Sussan Moussavi et al., 2023).

The provision of public infrastructures and amenities becomes a crucial and important indicator for the physical development in sustainable development (Mas'ari & Hk, 2017; United Nations, 2023; Yoshino & Paul, 2019). The need to cater for public infrastructure and amenities requires optimum use of the land, especially in the urban areas, as well as to redevelop the land in optimum development capacity. Meanwhile, as the land is almost fully occupied in the urban areas, the development supported by technologies pushed a higher level of stratified development (Jamalludin et al., 2016). The development or redevelopment requires a development approach to fully utilise the land, upwards and downwards (Li et al., 2016; Vähäaho, 2014). Thus, the vertical development, such as stratified high-rise building emerge, as well as the tunnelling for the use of underground land.

In addition to that, the legal framework on the use of land is very limited, and most land ownership is confined to a two-dimensional (2D) perspective. These emerging development approach of stratified building and underground development needs to balance the private and public rights. The land legal framework in Malaysia, for example, is still on this 2D perspective, although there is physical development of stratified and multi-layer development. As such, this study intends to explore and analyse the introduction of underground land in its legal framework, proposing the new 3D ownership to cater for the multi-layer development, mainly on the airspace above the surface of the land.

2. METHODOLOGY

This study embarks on qualitative approaches, which are more appropriate to answer the research question on how to balance the rights of the land ownership of the surface land

2 of 12

ownership compared to the underground landowner in proposing the new airspace ownership above the surface land. It is also able to reach the objective of the study to strengthen the current land legal framework in introducing the new 3D land ownership in Malaysia.

The research is conducted with content analysis of the current legal framework, focusing on the case study of underground land development, particularly the compulsory underground land acquisition. A case study involves the current court cases in underground land acquisition to see how the court interprets the landowner's current development approach. Additionally, interviews and small group discussions are conducted to gather information and data inputs. The content analysis method is used to process the inputs and information, and will be discussed in this paper in the following paragraph.

3. RESULTS AND DISCUSSIONS

3.1 Land ownership concepts and frameworks

The current legal framework of land ownership in Malaysia sees several evolutions from its original frameworks. The land legal framework is based on the National Land Code [Act 828] (NLC), which was officially enacted in 1965. It is informed by the key informant in the interview that it took several years to enact the framework since it is a combination and uniformisation of the laws from several states, particularly in Peninsular Malaysia. It can indeed be found in the preamble of the NLC, where it provides, among others, as follows:

*“An Act to **amend and consolidate the laws relating to land and land tenure, the registration of title to land and of dealings therewith and the collection of revenue therefrom within the States of Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territories of Kuala Lumpur, Putrajaya and Labuan and for purposes connected therewith.***

*WHEREAS it is desired to introduce in the form of a National Land Code **a uniform land system** within the States of Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur:*

AND WHEREAS” (emphasis added)

As such, the ownership and land tenure are fully governed by the NLC. The land ownership and tenure are reflected and proved by the title to the land (Abdul Karim et al., 2010; Maidin et al., 2022). Every individual can be granted a lot of land under the NLC or convert the land ownership before the enforcement of the NLC into the current land ownership system (National Land Code [Act 828], 2020). However, there are amendments in the land ownership and tenure, one of which is in 1985, where the subsidiary's land title emerged as full ownership under a strata title. It is by virtue of the introduction of the Strata Title Act 1985 [Act 318] (STA), to replace the subsidiary title for the ownership and tenure of multi-layer buildings within a single lot of land.

The introduction of the STA, Act 318, provides a new milestone for the land legal framework, especially under land ownership and land tenure (Bakri, 2025). This framework supports and accelerates the development of stratified buildings within a single land lot. The development of stratified buildings from conventional flats to a diverse combination of multi-purpose and mixed-use buildings becomes more secure with clear ownership and tenure. Moreover, ownership becomes more complicated, especially in the management of the building, which requires another legal framework to be enacted, known as the Strata Management Act 2007 [Act 757] (SMA).

Despite the rapid development and mushrooming of the stratified building with various designs and uses, the STA and SMA are still subject to the main land ownership and legal framework, which is the NLC. The provisions of the laws in those two legislations must not conflict with the main land legal framework underlined in the NLC. Furthermore, it must also be in line with the planning laws, as stipulated under the Town and Country Planning Act 1974 [Act 172] (TCPA), which complements the general planning framework already embedded in the NLC (Mohamed et al., 2023).

The evolution continued in 1990, when the land legal framework was once again amended, providing a significant impact. The amendment in 1990 introduced underground land ownership and tenure. The underground land can be used and utilised further for development to support the physical development needs. This evolution and development of land ownership expands the capacity and usufruct of the land. Implicitly, the land resource is doubled, at least, for the use of underground land as compared to the limited surface land. The current land ownership, considering the new ownership introduction of underground land, is illustrated in Figure 1.

Thus, land resources are being opened for new development, going downwards below the surface of the land. This initiative is replicated from the underground development in developed countries, such as the United Kingdom, especially the development of the underground rail or metro and subway for motorways (Jabatan Percetakan Negara, 1990). However, the research finds that there are still loopholes in the land ownership of the airspace, although there are STA which provides the use and ownership, literally, above the surface of the land.

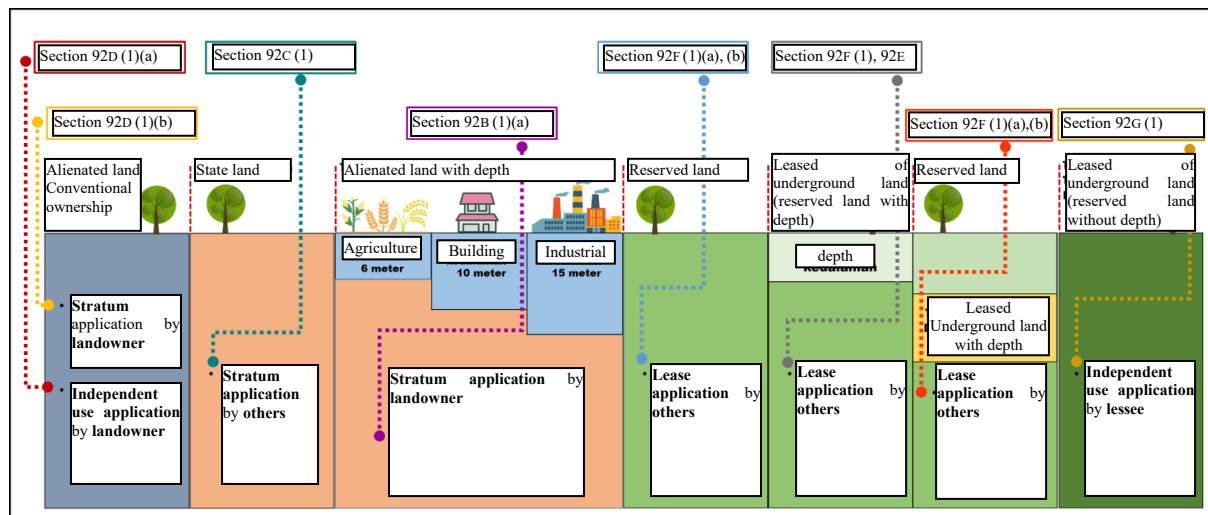


Figure 1: Current underground land framework under the NLC (Panduan Pelaksanaan Pelupusan Tanah Bawah Tanah Di Bawah Kanun Tanah Negara (Disemak-2020) [Akta 828], 2021)

3.2 Private ownership and public rights

There are a lot of discussions on the introduction of underground land in Malaysia, especially focusing on the development and introduction of underground land ownership (Zaini & Mohsin, 2021). Most of the discussions are on the legal framework of the underground land, although there are also discussions on aspects such as valuation, survey and geomatics. This research is more keen and of interest to the legal framework, over the others, as it builds up the recognition of the land legal system, especially the land ownership.

The land legal framework provides that the land can be alienated by the State Authority to an individual, as stipulated under the NLC (Maidin et al., 2022). The alienation provides ownership to the private landowner together with the rights to use and to transact with the land. The alienation of the land must be done only on the State land, an area of land which is not owned by a private individual.

Thus, it is found that the land ownership and tenure are still conventional, which is in its 2D format and perspective. Every alienation of the land, transfer of the rights and ownership of the land based on the surface of the land, from the State Authority to private individuals. The ownership is confined to a limited use and rights as mentioned in section 44 of the NLC. The private rights are only to a certain extent, below and above the surface land. The exclusive use and right of enjoyment of the land is said to be subject to reasonable and lawful use. Section 44 of the NLC provides as follows:

“(1) Subject to the provisions of this Act and of any other written law for the time being in force, any person or body to whom (under this Act or a previous land law) land has been alienated, reserved land has been leased or a temporary occupation licence (including a

licence so styled under a previous land law) has been granted in respect of any land, **shall be entitled to—**

(a) ***the exclusive use and enjoyment of so much of the column of airspace above the surface of the land, and so much of the land below that surface, as is reasonably necessary to the lawful use and enjoyment of the land;***

(b)”(emphasis added)

In such a case, the conventional ownership and tenure of the land enumerated under the NLC does not clearly interpret the “reasonable necessary” and “lawful use” of the land. This echoes the conflict in the land management and administration, as the legal framework is silent or has no clear interpretation on the matter. In fact, it can create tension to strike a balance between private and public rights (Salleh & Peng, 2022). It seems more complicated in urban areas, where the private landowner may enjoy its land to the initial rights of the column above the airspace and the land below that surface, in the development comprises or public infrastructure and amenities.

In addition, the plan, which is attached to the title notes that the indefeasibility of title and confers the exclusive rights to private individuals, is still in 2D whether under the NLC or under the STA (Mohamed, Razali, et al., 2024). However, extra caution has taken into account for ownership under the STA, which provides further details on the plan of ownership for strata title, which shows the plan of the buildings and parcels from every angle. Unfortunately, the plan is also in 2D and needs to be read and cross-referred to clearly understand the exact area and border of an ownership. An example of the plan is illustrated in Figure 2.

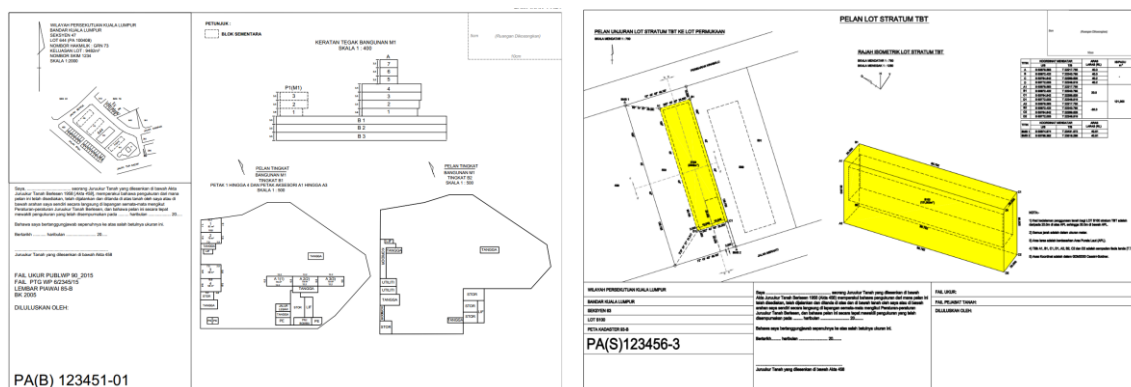


Figure 3: Examples of a land plan for strata and stratum (Lim et al., 2018)

Thus, the public rights, such as right of way, as well as infrastructure for those purposes, may coincide with private ownership if not clearly demarcated. It creates challenges for the government to provide further development of public infrastructures and amenities above and below the surface of the land. The only possible development approach for multi-layer development, especially for the public infrastructure and amenities, is through the compulsory

land acquisition under the Land Acquisition Act 1960 [Act 486] (LAA), and the airspace permit under section 75A of the NLC.

3.3 Underground land acquisition

The underground land development is quite popular in developed countries, including European, Western, and Asian countries (Pandola, 2011; Vähäaho, 2016; Zhang et al., 2020; Zhou & Zhao, 2016). Some researchers suggest that the most common underground land use is tunnelling for roads and railways, besides other urban underground spaces (Working Group 4, 2000; Zhao et al., 2000). The underground land development in Malaysia is not quite new, but it emerged rapidly in recent years, as shown in Table 1. Most of the underground development is for public infrastructures such as roads. Several projects have been initiated since the introduction of underground use and ownership in 1990. However, the use of underground land development is based on the surface land ownership, which is State land or reserved land, without the involvement of private ownership (Mohamed, Mohamad Sayuti, et al., 2024).

Table 1: List of Underground Developments in Malaysia (extracted from Abu, 2023)

No	Types of Uses	Projects	Location	Year	Details
1.	Business space and parking	Plaza Dataran Merdeka/ Merdeka Square	Kuala Lumpur	1990	2,589.20 square meter, 480 parking spaces
2.	Business space and parking	Petronas Tower	Kuala Lumpur	1997	5 basement floors for business space and parking use
3.	Tunnels/ Rail Stations	<i>Light Rail Transit (LRT), Kelana Jaya Line</i>	Lembah Kelang	1998	A combination of high-rise, underground and at-grade rail lines. Total range of 46.4km
4.	Dam	Pergau Dam	Kuala Yong, Kelantan	2000	Malaysia's largest hydropower station with a capacity of 600MW
5.	Road tunnels and floodwater management	<i>SMART Tunnel</i>	Kuala Lumpur	2007	Southeast Asia's longest flood diversion tunnel (9.7km)
6.	Tunnels/ Rail Stations	<i>Mass Transit Phase 1</i>	<i>Rapid (MRT),</i> Lembah Kelang	Fasa 1 – 2006	A combination of elevated and underground rail lines

As mentioned in the previous section above, the land ownership of private individuals extends to the column of airspace above the surface land and to the underground land below the surface land. As such, any usage or development above or below the surface of the land requires another ownership of the rights to be possessed. Unfortunately, as most of the current ownership in Malaysia is still conventional, the multi-layer development of land, particularly for underground land, is impossible without compulsory land acquisition, under the LAA. Meanwhile, the development of the column of airspace above the surface land is still unexplored, which attracts this research to be in place.

As such, the compulsory underground land acquisition is the only choice available. The recent cases on the underground land acquisition sparked some intuitive for a lesson in introducing and implementing the development of the column above the surface land. The major compulsory underground land acquisition is for the railway tracks for projects like Mass Rapid Transit (MRT) and new projects of East Coast Rail Link (ECRL). Both projects are government initiatives in public infrastructure for improving and providing further options for transportation and ease of mobility. The emerging trend of underground land use for railways is illustrated in Figure 3.

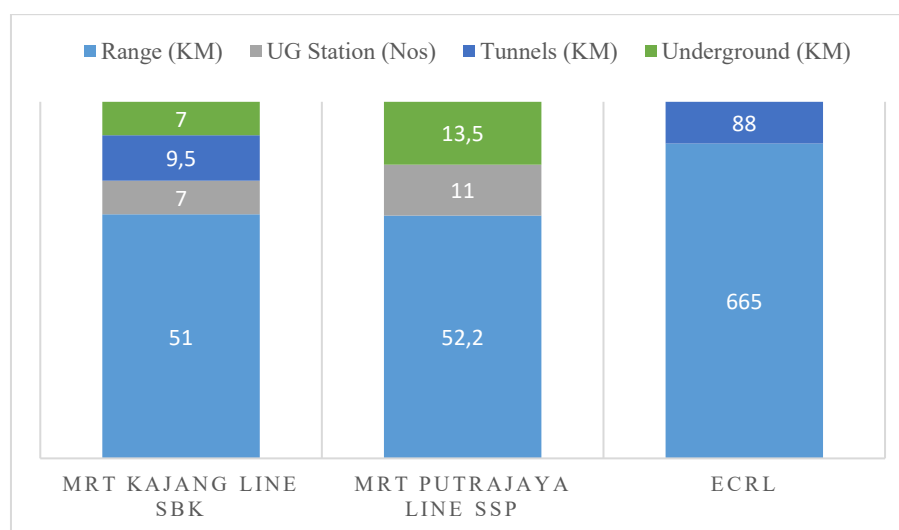


Figure 3: Trend of current underground development for railways (Author's illustration)

The study finds that there are 2 cases of compulsory underground land acquisition brought to the court under the ECRL projects for its compensation. It is quite small and stands out compared to the 88 cases that fall under hearing and enquiry proceedings before the land administrator at the land offices. Similarly, the MRT projects record only 3 cases brought to the court in MRT Phase 3, particularly challenging the underground land compensation. This compensation issue is part of the issue of the enjoyment of a private landowner in their deprivation of rights to property.

4. PROPOSED 3D OWNERSHIP FOR AIRSPACE AND MULTI-LAYER USAGE

Analysing the implementation of the underground land development in Malaysia, there are several elements that need to be considered in the introduction of the airspace and multi-layer usage on a single lot of land.

4.1 Ascertainment of ownership

The study finds that the critical factor that forms the basis of ownership and usage is the clear legal framework for the ascertainment of ownership. It is clear from the current legal framework

that this matter has been taken into consideration in the land ownership concepts and framework, whereby it extends to a limited, reasonable necessary use and enjoyment only. On the surface of the land, the ascertainment of ownership is clear, shown by the two-dimensional (2D) plan of the land. The extent of the ownership and rights is limited to the border of the land where it is located and demarcated.

As the multiple use of the land in the vertical horizon, the limited reasonable necessary use is very vague and on the grey area. The multi-layer development, which is not connected to each other, either in the column of airspace or the underground land below the surface, is yet to be clarified. The guideline on the underground development is provided by the respected agency, but the ownership of the underground land is hardly ascertainable. The guidelines of the underground alienation published by another respective agency, namely the Department of the Director General of Lands and Mines, need to be reviewed and strengthened following the current trend of underground development. Lack of new fresh alienation of underground land contributes to the proof of efficiency of the guidelines and the underground land alienation's implementation.

This study proposed that the 3D ownership is the main possible option for successful multi-layer development and ownership, as it ascertains the border of the land for development and ownership. The border of ownership will be based on a three-dimensional which combined all the possibilities of the land volume. As such, the development on the surface of the land, the column of the airspace, and the underground land can be separately alienated and developed, and form at least three layers of development on the same lot of land. The land is no more uncertain on its depth or height, it provides a clear and solid parcel of land for private ownership.

4.2 Unmirroring the underground, across the board

The study also finds that there are proposals and research on the airspace alienations to mirror the underground land alienation, called “spatium”. However, due to the findings of this study, it is quite impossible to just mirror the provision of the underground land for the airspace alienation. The issue is related back to the ascertainment of ownership, and the lack of fresh alienation of underground land in the current legal framework. The analysis of the court cases of compulsory underground land acquisition and the guidelines on the payment of compensation require the ownership to be clearly limited and ascertained. Besides, the informant holds the view that there will be an issue of “hanging structure dilemma” if the framework mirrors the current underground legislation.

The introduction spatium, or airspace alienation, needs to be based on the practical and effective use of the column of the airspace above the surface land for development. Lessons learnt from the underground land acquisition, particularly on the issue of compensation, the effective use of the land, as in this study, the underground land, has been raised by the Valuation and Property Services (Jabatan Penilaian dan Perkhidmatan Harta - JPPH). As such, the effective use of the column of airspace above the surface land needs to be determined first. In addition, this study agrees with the opinion of the informant that there must be a strong political will to implement

the airspace or 3D ownership, where the State-level land administration should provide the rules and regulations.

By determining the effective use of the column of the airspace above the surface land, the surface land use can be limited to such height, and the private ownership can only enjoy the land up to that height. These actions and elements are a two-headed spear, one of which its limit the compensation payment to the private landowner in the case involving compulsory land acquisition. Another impact of the action is that the multi-layer development can be carried out above the height, as shown in the 3D plan of the respective surface land, without encroaching on the private ownership, while balancing the public and private rights.

5. CONCLUSION

The evolution of the development approach with the support of advanced and emerging technology requires the legal framework to be dynamic in adapting to the changes and adopt the best legal framework to support the development. The concept of land ownership, together with land management and administration, needs to be proactive while resilient to the impact of development on land ownership. The findings suggest, among others, that a new 3D ownership is a better option for the introduction of a legal framework on airspace alienation and usage. The unsatisfactory achievement and ineffective implementation of the underground land alienation should be a lesson learnt in improving the legal framework, especially in introducing new 3D ownership for multi-layer development.

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BIOGRAPHICAL NOTES

Ahmad Hamidi bin Mohamed started his employment at SME Bank in Kuala Lumpur, Malaysia, after shortening his pupilage term in Messrs. Abdullah & Zainuddin. A year later, he joined Public Services and served in the Department of the Director General of Lands and Mines (Federal) and is currently posted as Principal Assistant Director. Most of his public service term in these 20 years is on the policy of land administration and management, with his niche area being compulsory land acquisition. He has also been the Land Administrator for the state of Perlis and the Federal Territory of Kuala Lumpur. He is currently pursuing a doctorate at a public university in Malaysia. He was actively involved in the Association of Land Professionals of Malaysia (*PERTAMA*), a student member of the Associated Research Centres for the Urban Underground Space (ACUUS) and has also published several articles in journals and department publications.

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